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Supreme Court Of The United States

_____Term, 1954

No. 19909

ALMON H. RICKENBAKER, PETITIONER,

versus

UNITED STATES OF AMERICA, RESPONDENT,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES

Your Petitioner, Almon H. Rickenbaker, would respectfully show unto the Court:

GROUND ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The Petitioner was convicted and sentenced under an indictment charging income tax invasion for the years 1949 and 1950 in violation of 26USC145(b) in the United States District Court for the Eastern District of South Carolina. The Petitioner was sentenced to two years imprisonment and a fine of five hundred dollars ($500.00).

The Petitioner appealed to the United States Court of Appeals for the Fourth Circuit from the conviction and sentence. That Court in a per curiam order affirmed the judgment of the District Court on June 9, 1954. Thereafter, the Petitioners petitioned the Court of Appeals for a rehearing, which petition was denied on June 21, 1954.

On June 24, the Court of Appeals for the Fourth Circuit stayed the mandate of that Court for a period of thirty days so that Petitioner might file this petition for certiorari.

This Court has jurisdiction to review the judgment herein by certiorari by reason of 62USC928, enacted June 25, 1948, c.646.

QUESTIONS PRESENTED

1. Did the Trial Judge err in permitting the Assistant District Attorney to ask Petitioner upon cross-examination.

(1) "Now, Mr. Rickenbaker, do you think that a man who may be convicted of several major crimes is worthy of as much belief as an ordinary, good, law abiding citizen?"

(2) "Do you think a person who has been convicted of crime repeatedly is worthy of as much belief as a law abiding citizen?"

(3) "Have you had a good deal of legal expense during the course of the last few years?"

(4) "Have you ever been convicted of violating the liquor law?"

(5) "Have you ever been convicted of assault?"

STATUTE INVOLVED

26USC145(b) provides:

"b) Failure to collect and pay over tax, or attempt to defeat or evade tax.

Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than ten thousand dollars ($10,000.00) or imprisoned for not more than five years, or both, together with the costs of prosecution."

STATEMENT OF CASE

The Petitioner was indicted in Aiken, S. C., during the Fall term of 1953, for United States tax fraud for the sum of $947.00 for the years of 1949 and 1950. Motion was made by Petitioner's Counsel for a continuance of the case due to Counsels recent illness and hospitalization; motion denied although Counsel respectfully requested examination by competent physician.

The Petitioner has but little education. He had to quit school when he was only twelve years of age and help support himself and his family on acocunt of the death of his father. Petitioner was able to finish only the sixth grade.

Upon being forced to leave school, Petitioner first worked as a delivery boy on a bread truck. That work lasted less than a year. After leaving that work, Petitioner obtained a job with a bakery in Orangeburg, South Carolina, wrapping bread and cakes. After working at that job for three or four years, Petitioner then obtained a job as a clerk in a furniture store where he worked until sometime in 1928, when he enlisted in the United States Navy. He served in the Navy from 1928 until 1932 when he was discharged.

After his discharge from the Navy, Petitioner returned to Orangeburg, South Carolina, where he acquired a few pieces of real estate upon which some buildings were erected which were for the most part were rented. Petitioner also operated a bicycle repair shop and rented out piccolos and pin-ball machines. It is the income from the rental property, piccolos, pin-ball machines, and the income from repair of bicycles that Petitioner is charged with failing to properly report to the Internal Revenue Department for the year 1949 in the sum of $679,00 for the year 1950. Twenty-eight witnesses testified for the Government. The record indicates from testimony of the Government's witness that Petitioner obtained tax service during that time for which he is charged, and that the so-called tax expert placed an error in regards to stock inventory for the same period in the amount of $200.00. The record further indicates that in the fall of 1951 Petitioner informed the proper authorities that he had failed to report certain rentals in his tax return due to his negligence and mistake. Eight witneses testified for the Petitioner, in addition to the Petitioner who testified in his own behalf. The Petitioner was convicted and sentenced to two years imprisonment and a fine of $500.00. This appeal followed.

ARGUMENT

The questions presented by this Petition question the propriety of the trial Judge in permitting the Assistant District Attorney to ask Petitioner on cross examination the following questions:

(1) "Now, Mr. Rickenbacker, do you think that a man who may be convicted of several major crimes is worthy of as much belief as an ordinary, good, law abiding citizen?"

(2) "Do you think a person who has been convicted of crime repeatedly is worthy of as much belief as a law abiding citizen?"

(3) "Have you ever been convicted of violating the liquor law?"

(4) "Have you been convicted of assault?"

(5) "Have you had a good deal of legal expenses during the course of the last few years?"

The Court of appeals in its brief per curiam order affirming Petitioner's conviction stated:

"While we do not approve parts of the cross-examination of which complaint is made, we do not find anything therein which would justify the setting aside of the verdict and the granting of a new trial."

We respectfully submit that the Court properly found that the cross examination complained of was improper, but, we submit that the Court should have reversed the judgment of conviction and ordered a new trial.

The cross-examination complained of was most highly improper and was highly prejudicial to the legal rights of the Petitioner and resulted in depriving the Petitioner of a fair and impartial trial guaranteed to Petitioner by the United States Constitution.

Wherefore, Petitioner prays for the allowance of a writ of certiorari to the United States Court of Appeals for the Fourth Circuit in order that this decision may be reviewed and determined by this Honorable Court and that this Court reverse the Judgment of the Court of Appeals and direct that a new trial be granted Petitioner.

ALMON H. RICKENBAKER

Petitioner

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6782

ALMON H. RICKENBAKER, *Appellant*,

versus

UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court for the Eastern District of South Carolina, at Columbia

Argued June 2, 1954. Decided June 9, 1954

Before Parker, Chief Judge, and Soper and Dobie, Circuit Judges

J. A. Hutto (John B. Baltzegar on brief) for Appellant, and Fred G. Folsom, Special Assistant to the Attorney General (H. Brian Holland, Assistant Attorney General, Ellis N. Slack, David L. Luce, Joseph M. Howard and David R. Urdan, Special Assistants to the Attorney General; N. Welch Morrisette, Jr., United States Attorney, and Irvine F. Belser, Jr., Assistant United States Attorney, on brief), for Appellee.

Per CURIAM:

This is an appeal from a conviction and sentence under an indictment charging income tax evasion for the years 1949 and 1950 in violation of 26 USC 145(b). The contentions presented on appeal are that there was error in refusing to continue the trial of the case and in permitting the appellant to be asked on cross examinaiton whether he thought a man who had been convicted of major crimes was worthy of belief, whether he had been convicted of receiving stolen property, violation of the liquor laws and assault and whether he had incurred legal expense in recent years.

The question of continuance was a matter resting in the sound discretion of the trial judge. That matter is not argued in the brief of appellant and nothing is called to our attention indicating that the discretion was abused. While we do not approve parts of the cross examination of which

complaint is made, we do not find anything therein which would justify the setting aside of the verdict and the granting of a new trial. It was, of course, competent to show by the cross examination of appellant that he had been convicted of receiving stolen property, as this was a matter going clearly to the question of his credibility. No objection was made to the question as to appellant's conviction of assault. A more serious question arises as to the competence of the question relating to his conviction for violation of the liquor law for which he received a minor sentence; but we need not go into this, as we think that it could not have affected the result in view of appellant's admission that he had been convicted of receiving stolen property and of the testimony offered as to his bad character. The other matters complained of, such as asking his opinion as to whether a man who had been convicted of crimes was worthy of belief and asking him as to whether he had recently incurred legal expenses are too insignificant for consideration. While a prosecuting officer should not engage in this sort of cross examination, an appellate court would not be justified in awarding a new trial on account thereof.

Affirmed.

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6782

ALMON H. RICKENBAKER, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court for the Eastern District of South Carolina

This cause came on to be heard on the record from the United States District Court for the Eastern District of South Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and

adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

June 9, 1954.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.

ORDER AS TO PETITION FOR REHEARING

Filed and Entered June 16, 1954

(Style of Court and Title Omitted)

It is ordered that the letter of John B. Baltzegar, Jr., dated June 14, 1954, addressed to Chief Justice J. J. Parker, and the argument attached thereto, be filed in the above entitled case, and treated by the Court as a petition for a rehearing.

June 16, 1954.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.

PETITION FOR REHEARING

Filed June 16, 1954

John B. Baltzegar, Jr.
Attorney and Counsellor at Law
Norway, S. C.

June 14, 1954.

Chief Justice J. J. Parker,
U. S. Court of Appeals,
Fourth Circuit,
Richmond, Va.

Re: No. 6782 Almon H. Rickenbaker vs. U. S. of America

DEAR SIR:

My understanding was that I had 2 weeks in which to place my argument before the Court and yet in less than one weeks time I received notice that your court has affirmed the lower

Court's decision. In view of the foregoing, and the fact that I have just been released from the Veteran's Hospital, I feel that as Attorney-in-chief in this case I should be permitted, in the interest of justice, to present my client's exceptions within the two-week period I was under the impression I would have. With that end in view, I am submitting my enclosed argument for consideration at this time.

Yours very truly,

JOHN B. BALTZEGAR, JR.

ARGUMENT

Exception No. 7. Did the court err in allowing the witness Strom to testify to the reputation of the defendant when it was not shown that he was not a resident or a regular commuter and had no direct contact with the accused.

In viewing the testimony of this case in regards to the above-mentioned exception it is the sole desire of counsel to show in this argument that:

1. Lt. J. P. Strom was not a resident or commuter of the community of which the defendant is a resident or was at the time thereof;
2. The witness did not qualify by testimony that he had the experience and/or contact with the persons who were directly acquainted with the defendant;
3. That it can only be concluded from the testimony in the case that Lt. Strom's testimony is merely hearsay and opinionated and therefore not admissible.

Certainly the rule that only members of the community in which the defendant resides are competent to testify with reference to character and reputation, *State v. Nelson*, 166 Minn. 371, 208 N. W. 129. Lt. Strom does not show by direct or cross-examination that he was a commuter or resident, but he does indicate that he resides a goodly distance from this locale (to wit approximately fifty (50) miles). By the nature of his employment Lt. Strom is necessarily precluded from knowing the defendant and that by his own admission they do not have acquaintances in common and have

only met on one occasion. The prevailing rule to prove whether or not the good or bad character or reputation of the defendant in a criminal prosecution should be put in evidence is to be confined to the general reputation of the person in the neighborhood, 28 A. L. R. 933; *State v. Steen,* 185 N. C. 768, 117 S. E. 793. In view of the fact that the defendant took the stand as a witness in his own behalf the prevailing rule as to competency of the impeaching witness applies. In giving evidence to impeach the character of another witness, the impeaching witness must speak from the other's general reputation, and not from his own private opinion, *Teese v. Huntington,* 23 How. (US) 2, 16 L. Ed. 479; *State v. Potts,* 78 Iowa 856, 43 N. W. 534, 5 L. R. A. 814; *State v. Magill,* 19 N. D. 131, 122 N. W. 330, 22 L. R. A. NS 666; *Griffin v. State,* 26 Tex. App. 157, 9 S. W. 459, 8 Am. St. Rep. 460. He may not give his own opinion of the other's character, *State v. Thomas,* 8 Wash. 2d 573, 113 P. 2d 73, 22 L. R. A. N. S. 650; 82 Am. St. Rep. 27. The impeaching witness may be asked if he is acquainted with the general reputation for truth and veracity of the witness sought to be impeached; and it is erroneous to refuse to permit him to answer such question unless he first states that he has heard a majority of all his neighbors speak of the character of the impeached witness for truth and veracity, *Crabtree v. Hagenbaugh,* 25 Ill. 233, 79 Am. Dec. 324, 90 A. L. R. 879. An impeaching witness may be cross-examined fully as to the extent and source of his knowledge respecting the general reputation of another witness, 82 Am. St. Rep. 28. The cross-examination of the witness may extend to his opportunity for knowing the character of the other witness, the length of time, the generality with which the unfavorable reports have prevailed, and the persons from whom he has heard them, *Phillips v. Kingfield,* 19 Me. 375, 36 Am. Dec. 760, 16 L. Ed. 480.

The only logical reasoning that can be deduced from the government's testimony as to the reputation and character of the defendant is that such testimony was opinion evidence based solely on Strom's acquaintance with the local police. It is well settled law and beyond dispute that such evidence to be admitted must be based upon the personal

observation of the defendant by the witness in order to state opinion, conclusion or impression, 32 C. J. S. 66 and 67, *Asher v. Beckner*, 41 S. W. 35, 19 Ky. L. 521; *State v. Pickett*, 210 N. W. 782, 202 Iowa 1321.

In conclusion it is felt that the statements, remarks, rulings and objections along with this exception and the sentence are sufficient for this Circuit Court of Appeals to reverse the findings of the District Court and remand the case for a new trial.

Asheville, N. C.,
June 16, 1954.

Mr. John B. Baltzegar,
Attorney at Law,
Norway, S. C.

Re: No. 6782, Rickenbaker v. United States

DEAR SIR:

I have your letter of June 14 enclosing copy of argument and stating that your understanding was that you had two weeks in which to file argument with the court and complaining that within less than one week you received notice that the court had affirmed the lower court's decision.

In reply to your letter I will say that I duly received letter from you dated June 3 in which you stated:

> "Mr. Hutto yesterday told me of the very kind offer of the Court to allow me to file a written brief in the Rickenbaker appeal. I greatly appreciate the Courts extending me this courtesy but due to the state of my health, I will not attempt to prepare this brief."

After I received this letter the court handed down the opinion affirming the conviction in the above entitled case.

I am entering order that the "argument" enclosed in your letter be treated as a petition for rehearing, and the court will consider it as such.

Yours very truly,

——— ———.

JJP/B.

ORDER DENYING REHEARING

Filed and Entered June 21, 1954

(Style of Court and Title Omitted)

The letter of John B. Baltzegar, Jr., dated June 14, 1954, and the argument attached thereto, being treated by the Court as a petition for a rehearing in the above entitled case:

On consideration whereof, it is ordered by this Court that the rehearing asked for be, and it is hereby, denied. Let mandate issue after the expiration of five days.

JOHN J. PARKER,
Chief Judge, Fourth Circuit;
MORRIS A. SOPER,
United States Circuit Judge;
ARMISTEAD M. DOBIE,
United States Circuit Judge.

June 22, 1954, petition of appellant for a stay of mandate filed.

ORDER STAYING MANDATE

Filed June 25, 1954

(Style of Court and Title Omitted)

Upon the application of the Appellant, by his counsel, and for good cause shown,

It is ordered that the mandate of this Court in the above entitled case be, and the same is hereby, stayed pending the application of the said Appellant in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, provided the application for a writ of certiorari is filed in the said Supreme Court within 30 days from this date.

June 24th, 1954.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 229

ALMON H. RICKENBAKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the Court of Appeals (Pet. 8-9) is not yet officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 9, 1954 (Pet. 9-10), and a petition for rehearing was denied June 21, 1954 (Pet. 14). The petition for a writ of certiorari was filed on July

21, 1954. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1). See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Did petitioner suffer prejudice when the prosecutor asked him on cross examination whether a person convicted of crime is as worthy of belief as a law-abiding citizen, and whether he had had a good deal of legal expense during the last few years?

2. Did the District Court err in permitting Government counsel to question petitioner on cross examination concerning prior convictions for assault and liquor law violations?

STATUTE INVOLVED

INTERNAL REVENUE CODE:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall,

in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145.)

STATEMENT

On September 21, 1953, a two count indictment was filed in the United States District Court for the Eastern District of South Carolina charging petitioner with attempting to evade his income taxes for 1949 and 1950 in violation of Section 145(b) of the Internal Revenue Code. The petitioner was convicted on February 19, 1954, the jury deliberating for a short time. Petitioner was sentenced to two years imprisonment and fined $500. The Court of Appeals affirmed. (Pet. 9-10.)

To prove its case the Government introduced witnesses to show that petitioner received more rental income (Tr. 7, 16, 40, 49, 57, 69, 103, 113, 126) and more income from coin operated machines and punchboards (Tr. 57, 93, 134, 140, 142, 148, 150, 154, 159) than he reported on his tax returns. Other Government witnesses produced evidence of petitioner's expenses. (Tr. 167, 171, 175, 183, 188, 202.) Special Agent Veach testified that petitioner informed him that all his sources of income were as listed on his tax returns but it developed

that certain items had been omitted. (Tr. 216, 399-407).[1]

The amounts of net income and taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows:

	Reported		*Corrected*	
	Income	*Tax*	*Income*	*Tax*
Count I (1949)	$514.92	$-0-	$ 2,200.62	$ 231
Count II (1950)	390.30	-0-	4,405.38	625

There was evidence that during the investigation petitioner tried to conceal evidence and to persuade witnesses not to reveal the amounts they paid him during the years involved. (Tr. 62, 96-98, 103-106, 110-112, 217-222). Veach testified that petitioner kept no adequate records, and he described the manner in which petitioner's income and expenses were determined, summarizing the items in a general way, and pointing out that all doubts were resolved in petitioner's favor (Tr. 207-254).

Petitioner took the stand in his own behalf and described his background and early business career, conveying the impression that he was a reputable business man. (Tr. 314-322.) He later tried to contradict the testimony of several Government witnesses as to the amount of income he had received from pinball machines and rental property. (Tr. 324-333, 342-345.) The questions and answers on cross-examination to which the pe-

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[1] References to the typewritten reporter's transcript of the evidence will be designated "Tr." while references to the printed appendix below will be designated "R".

tition is addressed are stated and discussed in the Argument, *infra*.

ARGUMENT

1. On cross examination, counsel for the Government recalled (R. 1) that on the preceding day of trial petitioner had reviewed his background and business career in detail, going as far back as age twelve. The prosecutor then asked petitioner whether a man who may be convicted of several major crimes is worthy of as much belief as an ordinary, good, law-abiding citizen. (R. 2) Petitioner answered (R. 2) by saying he was honest, had never beat anyone out of anything, and had come up the hard way. The United States Attorney then repeated the question, defense counsel objected, the trial court made no ruling on the objection, petitioner did not answer, and the line of questioning was then abandoned, never to be resumed. The petitioner contends (Pet. 6) that this question was highly improper and prejudicial to his legal rights. But petitioner's answer was indirect, not responsive, and was actually favorable to him rather than prejudicial. The net effect of the two questions asked was a favorable answer to one and no reply to the other. There was no prejudice.[2]

2. Government counsel continued his cross-examination and asked petitioner whether he had

[2] The petition also challenges a question as to whether petitioner had had a good deal of legal expense during the last few years (R. 3-4). The answer was, "Not very much" (R. 4). This exchange was plainly insignificant, and, if anything, petitioner's response made it favorable to him.

ever been convicted of violating the liquor laws.[3] The court again ruled that the question was proper, and petitioner admitted (R. 3) that he had been convicted and served forty-five days. Petitioner was next asked whether he had ever been convicted of assault. Without any objection being raised, he admitted a prior conviction of assault, adding that he received no fine and served only three hours and a half. Petitioner now contends (Pet. 6) that these two questions were also highly improper and prejudicial to his rights.

It is well-settled that when a defendant takes the stand in his own defense he subjects himself to the same sort of cross-examination to which any witness is subject. *Johnson* v. *United States,* 318 U. S. 189, 195; *Raffel* v. *United States,* 271 U. S. 494. The latitude of this cross-examination is a matter resting within the sound discretion of the trial judge. *Lovely* v. *United States,* 175 F. 2d 312, 314 (C.A. 4th), certiorari denied, 338 U. S. 834; *Simon* v. *United States,* 123 F. 2d 80, 85 (C.A. 4th), certiorari denied, 314 U. S. 694; *Mourikas* v. *Vardianos,* 169 F. 2d 53 (C.A. 4th). See also III Wigmore, *Evidence* (3d ed.), Secs. 890, 982-983, 987, and VIII Wigmore, Sec. 2277.

We submit that the trial court did not exceed the bounds of its discretion in permitting peti-

[3] Prior to this, petitioner was asked if he had ever been convicted of receiving stolen goods. (R. 2.) Petitioner admitted that he had (R. 2), after the court ruled it was a proper question, stating that he served four months in prison. Petitioner does not question the propriety of this question in his petition.

tioner to be cross-examined as to his previous convictions and that no prejudice resulted. Petitioner had intimated on direct examination that he was an honest person and a respectable business man, and had contradicted Government witnesses as to the amount of income he had received. Evidence of these convictions reflected directly on his honesty and credibility. The evidence of conviction for a liquor violation, as well as for assault, was admissible, since, like the offense of which petitioner stood accused, it involved an offense against the revenue laws. *Workman* v. *United States,* 43 F. 2d 44 (C.A. 4th); *Jebbia* v. *United States,* 37 F. 2d 343 (C.A. 4th), certiorari denied, 281 U. S. 747. Also, petitioner made no objection to the assault question, and since he answered that he served only three hours and a half and was fined not a penny, the exchange was hardly prejudicial. Finally, as the court below said (Pet. 9), these questions "could not have affected the result in view of [petitioner's] admission that he had been convicted of receiving stolen property [see fn. 3, *supra,* p. 6] and of the testimony offered as to his bad character."

CONCLUSION

The decision below is correct, and no conflict of decisions or important question of law is involved. The petition for a writ of certiorari should be denied.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

H. BRIAN HOLLAND,
Assistant Attorney General.

ELLIS N. SLACK,
DAVID L. LUCE,
DAVID R. URDAN,
Special Assistants to the Attorney General.

AUGUST, 1954.

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